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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1244

EVELYN FALKOWSKI,
Petitioner,

v.

LOWELL PERRY, *etc., et al.,*
Respondent.

BERTRAM PERRY,
Respondent,

v.

ALVIN GOLUB, *et al.,*
Respondent,

and

EVELYN FALKOWSKI,
Petitioner.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Evelyn Falkowski hereby replies to the Brief for the Respondent EEOC.

EEOC has been represented by three separate teams of lawyers in this litigation: one in the district court in these cases, another in *Perry v. Falkowski* now pending,

and a third in appellate proceedings. The representations made in EEOC's brief in opposition indicate they have not been communicating with each other about the facts or the record below. EEOC's brief (page 6) states, ". . . nothing in either decision can be construed as a finding of criminal activity." This is patently absurd.

In the 1975 decision (not based on a trial on the merits) the district court found (Pet. App. 59a, 60a):

> . . . Mr. Perry's reassignment was motivated by a desire to remove the source of potentially embarrassing revelations concerning the Birmingham Office and by displeasure with Mr. Perry's actions in continuing to protest the District Director's [Petitioner's] conduct and in taking the matter to the United States Attorney.

and (Pet. App. 61a):

> According to the evidence in this case, these actions [of Petitioner] included issuing a cause decision in a case pending in court before receiving the investigator's report on which the decision was supposed to be based, giving instructions to "fail conciliation" (that is, to refuse to settle regardless of any offers made by the respondent), giving instructions to remove a no cause decision from the file in a case pending in court after unsuccessfully trying to change it to a cause decision . . . . *The suggestion of the evidence was that many of these actions were seemingly designed to use the commission's procedures to assist certain plaintiffs and their attorneys in pending court cases.* [Emphsis added.]

The court found (Pet. 64a) that "Mr. Perry's protests were ultimately vindicated by the investigation."

Such conduct is proscribed by the Criminal Code.[1]

EEOC argues (page 7) that the 1975 decision ". . . was vacated by the district court's 1976 decision . . . ." Assuming, *arguendo,* that it was, it was clearly reinstated by the district court's 1978 decision. The 1975 findings leap-frogged into the 1978 decision (Pet. App. 7a):

> At the preliminary injunction hearing, he [Bertram Perry] established that the "detail" was initiated largely as a result of the EEOC's attempts to suppress his continual and outspoken protest of the BIDO's mismanagement [by Petitioner] made to the Regional Director, the U.S. Attorney, and members of the public.

The 1978 decision quotes extensively (footnote 6, Pet. App. 18a, 19a) from an EEOC proposed disposition on EEO complaints of Bertram Perry involving Petitioner which an EEOC lawyer in the district court below had stated was based on the district court's 1975 decision, "the investigation shows that adverse actions were taken and/or attempted against you [Bertram Perry] because of your persistence in making known irregularities [by Petitioner] in the Birmingham District Office."

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[1] 18 U.S.C. 201.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of:

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

Anyone reading the decisions of the district court will presume that the Petitioner has been found guilty of the conduct enumerated above notwithstanding that the district court entered these findings without considering evidence which refutes such findings.[2] Petitioner has never had an opportunity to refute these findings in the district court. EEOC can't and doesn't dispute this.

The injury to Petitioner's reputation and threat to her career is immediate and is aggravated by the summary decision of the court of appeals.

The Office of the Special Counsel, established to protect "whistle blowers" in the federal government, considers the findings of the district court to be intact. That office wrote the Respondent Bertram Perry on May 14, 1979:

> . . . We note the decision of the U.S. Court of Appeals for the Fifth Circuit vacating the "protective orders" previously issued by U.S. District Judge Foy Guin in your case . . . . However, we have also noted the district court's strongly worded opinion of November 21, 1978, finding overwhelming evidence that the EEOC's decision to process adverse action against you was motivated by retaliation for the exercise of your First Amendment rights.

This letter has been offered by Bertram Perry to support his claims in *Perry v. Falkowski.* The Office of the

[2] Even assuming, *arguendo*, that the district court's findings do not impute criminal conduct to Petitioner in a strict, legalistic sense, the findings of the district court that Bertram Perry is a "whistle blower" for having called Petitioner's conduct to the attention of the United States Attorney clearly imputes unsavory conduct to Petitioner. "In the view of the community, the stain is a deep one; indeed it has become a badge of infamy." *Wieman v. Updegraff,* 344 U.S. 183, 191 (1952).

Special Counsel considers Bertram Perry to be a "whistle blower" and Petitioner to be the whistle blowee because of the district court findings.

The nature of the charges against Petitioner by Bertram Perry and the findings of the district court against her are such that the U.S. Attorney in Birmingham has since 1975 recommended that the Department of Justice not provide Petitioner with legal representation, even though she was sued as an official of the government as well as in her individual capacity. And the Department of Justice has accepted that recommendation. Petitioner has been forced to bear tremendous legal expenses since 1975 which belies the suggestion in the EEOC brief (page 7) that the petition mischaracterizes the nature of the charges and findings against Petitioner.

COLLATERAL CONSEQUENCES

Respondent EEOC cannot in good faith suggest that the collateral consequences to Petitioner are merely "speculative." They are real. And EEOC knows it. Bertram Perry intends to collaterally support his claims against Petitioner in the related pending litigation, *Perry v. Falkowski.* EEOC lawyers are aware of this. *Perry v. Falkowski* is pending before the Honorable Frank T. McFadden, Chief Judge of the Northern District of Alabama. Prior to the decisions of the court of appeals below, in connection with motions filed by the parties, Judge McFadden ruled that he was collaterally estopped by the findings of the district court below. Judge McFadden now has other motions under advisement which will be determined in part by whether collateral estoppel still applies. At a hearing on these pending motions on February 6, 1980, Judge McFadden expressed dismay at trying to understand the effect on

Perry v. Falkowski of the decision of the court of appeals (Pet. App. 2a-5a). All lawyers present, including the two representing the EEOC, expressed agreement with Judge McFadden that the decision of the court of appeals is unclear.

EEOC's concession that collateral legal consequences are "speculative at best" makes it conclusive that the *Sibron* test has not been met in the case at bar. This court has "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." *Sibron,* 392 U.S. at 55. In opposing this petition, the burden is on EEOC to show that there is no possibility of adverse collateral consequences to Petitioner.

The related pending litigation alone presents innumerable probabilities of collateral legal consequences. Can Bertram Perry bring to the attention of the jury in *Perry v. Falkowski* that he has been found to be a "whistle blower" based on the charges he has brought against Petitioner? Can Bertram Perry bring to the attention of the jury that the district court below ruled that he "established that [the EEOC had attempted] to suppress his continual and outspoken protests of the BIDO's mismanagement [by Petitioner], made to the Regional Director, the U.S. Attorney, and members of the public?" (Pet. App. 6a.) Can Bertram Perry use the findings of the district court below to attack the credibility of Petitioner? Petitioner's ability to defend herself in *Perry v. Falkowski* is in jeopardy because the unpublished decision of the court of appeals (Pet. App. 5a) did not deal with the district court findings and there is uncertainty as to its effect. Only this court can remove that uncertainty and restore the *status quo ante* to preserve Petitioner's right to defend herself on the merits.

JUDICIAL ECONOMY

Respondent EEOC argues against "waste of judicial resources."

The *raison d'etre* of the EEOC is to see that charges of denial of constitutional rights are brought before the federal courts without regard to questions of judicial economy. EEOC's indifference to the constitutional rights of Petitioner, its own employee, is ironic.

EEOC's argument is also fallacious. A greater amount of judicial resources will be required if this petition is denied than if it is granted. The controversy still rages in *Perry v. Falkowski.* If the court of appeals' decision is not clarified by this court, an appeal will be the likely result in *Perry v. Falkowski,* no matter how Judge McFadden rules on the issue of collateral estoppel. Both judicial economy and due process dictate that this court exercise its supervisory authority and remove the uncertainty.

At minimum, this court should grant the petition and summarily order that the decision of the court of appeals be modified to reverse all findings made by the district court so as to restore the *status quo ante.*

CONCLUSION

The summary treatment of this case by the court of appeals has resulted in a decision that has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Respectfully submitted,

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